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IN THE

SUPREME COURT OF THE UNITED STATES

MERCHANTS' HEAT AND LIGHT COMPANY, *Plaintiff in Error,*

v.

JAMES B. CLOW & SONS, *Defendants in Error.*

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No. 118.

October Term, 1906.

IN ERROR TO THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

W. H. H. MILLER,
Attorney for Plaintiff in Error.

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BRIEF FOR PLAINTIFF IN ERROR.

The only question for decision in this case is one of jurisdiction.

STATEMENT OF FACTS.

The facts upon which the question depends are set forth in a special finding of facts made by the court, the trial having been by the court without a jury.

Those facts as stated in the language of the court are in the transcript, on p. 23, and are as follows:

"For the last ten years William H. Schott has been a contractor and civil engineer, doing business and residing at Chicago, making a specialty of organizing corporations for heating and lighting purposes, and designing and building plants under contracts with such corporations. From 1899 to the present time said Schott has maintained a business office in the Marquette building, Chicago, designated William H. Schott, Engineer and Contractor, having his own name on its door, and for which he paid the rent. Defendant was organized as an Indiana corporation prior to August, 1902, for the purpose of building and operating a plant for the furnishing of heat, light and power in Indianapolis, Indiana, and being purely a local corporation of that state. On August 7, 1902, defendant and said Schott made a written contract, by which Schott agreed to construct, install and equip its plant, purchase all materials and apparatus necessary thereto, employ all necessary labor, at the best possible terms for defendant, personally superintend such construction, assume general management of the plant, and operate it for the company until fully completed, secure all business for the plant, approve contracts therefor, institute a system of bookkeeping, certify bills, have the heating plant ready for service December 1, 1902, and finally finished on or before July 1, 1903; and to pay as liquidated damages $50 for each day that steam was not provided for customers after December 1, 1902. The company was to pay Schott for the plant, $275,079.38, including his compensation, which was to be ten per cent. of all bills for construction. Said Schott continued to be the general manager of defendant until July, 1903, this suit having been commenced March 23, 1903, by service of summons on said Schott at his office in Chicago. At this time the construction of the plant had not been entirely completed. Said Schott was still acting as general manager as to such construction, and any business of defendant required to be done in Illinois, such as the purchase of cables, engines, boilers, generators, pipes, fittings and other supplies

for the extension of the plant, was done for defendant by said Schott as general manager down to a time later than the beginning of this action. On August 13, 1902, the contract in suit was made between plaintiff and said Schott as such general manager.

Section 5 of chapter 110 of the statutes of Illinois provides that a foreign corporation may be served with process by leaving a copy with its general agent, or with any agent of the company. Defendant never has maintained any office or had any property in Cook county, Illinois, nor has it had any business therein except such as it has done through its said general manager. The city of Chicago was and is the principal market for the supplies of the kind sold by plaintiff to defendant, and of the kind enumerated in this finding. A modification of the contract of August 13, 1902, by which flanges on the pipe were substituted for coupling and thread fastenings, was made between the plaintiff and said Schott, as general manager of defendant, in the city of Chicago. All business relating to the execution of said contract, except what was done by correspondence, was had at the office of said Schott in Chicago, and by him on behalf of defendant.

About the first of January, 1903, a controversy arose between the parties in respect to the final payment under said contract, and the right of defendant to set off damages for delay in the delivery of the pipe contracted to be sold to defendant, and frequent interviews were had at the office of said Schott in Chicago between him, as general manager of defendant, and the agents or attorneys for the plaintiff in respect to the adjustment of the controversy.

2. On August 13, 1902, the plaintiff, an Illinois corporation, entered into a contract with defendant for the pipe necessary in the construction of its plant, at prices which amount, as claimed by the plaintiff, to the sum of $33,933.84. Such contract provided that defendant should furnish detail drawings of the 15 and 20 inch pipe prior to September 1, 1902, and specifications of the balance of the pipe August 20, 1902; and it was agreed that the 12-inch pipe should be shipped immediately on

receipt of specifications, and the 15 and 20 inch pipe was to be delivered not later than October 1, 1902. All the negotiations leading up to the making of the contract of August 13, 1902, were had at the office of said Schott in Chicago, defendant being therein represented by him. Said contract was entered into in Chicago, was in all respects an Illinois contract, and was signed on behalf of the defendant by said Schott as general manager.

Defendant has paid upon the contract $24,833.63, leaving a balance, as claimed by plaintiff, of $9,417.37, less freight paid by defendant of $316.17.

4. Before making any general appearance the defendant appeared specially and moved the court, upon the record and certain affidavits appearing in the bill of exceptions settled by the court August 27, 1903, to quash the return of service made by the marshal on the ground that the defendant was a foreign corporation, and had no business, office, place of business or agency in Illinois.

Said motion was denied by the court July 29, 1903, and an order entered requiring defendant to plead or demur to the declaration within thirty days. Accordingly and on August 10, 1903, defendant pleaded the general issue, together with a notice of set off, claiming damages in the sum of $15,000 by reason of plaintiff's failure to furnish the 15 and 20 inch pipe until some time after the first day of October, 1902.

Afterward, and on December 3, 1903, defendant filed a bill of particulars of certain overcharges claimed by it to have been made by plaintiff, and the damages claimed by it by reason of delay in furnishing pipe as follows:

OVERCHARGES CLAIMED.

Oct. 16, 1902, overcharge on 15-inch pipe....	$197 26
Oct. 20, 1902, overcharge on 15-inch pipe....	144 31
(Paid by defendant Nov. 8, 1902.)	
Nov. 5, 1902, overcharge on 20-inch pipe....	213 57
Nov. 5, 1902, overcharge on 20-inch pipe....	219 77
Nov. 8, 1902, overcharge on 20-inch pipe....	204 73
Nov. 12, 1902, overcharge on 20-inch pipe...	234 04
(Paid by defendant Nov. 21, 1902.)	
Increased cost of purchase of 72 feet 20-inch pipe over contract price.....	18 00

DAMAGES FOR DELAY.

Expense of refilling and re-excavating trench and extra barricades due to failure to furnish above 72 feet	$210 00
Increased cost of laying 2,325 feet of 15 and 20 inch pipe after frost in December, January and February at $2.75 per foot	6,393 75
Additional premiums for liability insurance	575 83
Additional expense for superintendent and foreman	1,055 00
Estimated loss on contracts for heat	6,608 10
Estimated loss on contracts for light and power	4,757 53
Total	$20,831 89

Upon these facts the court stated its conclusions of law, 1 and 2, as follows:

1. Defendant was, during all the time from August 12, 1902, to the commencement of suit, doing business in Chicago, Illinois, and during all that time William H. Schott was its general managing agent. Service of summons was properly made upon him, as such agent.

2. By claiming of plaintiff in the bill of particulars a sum greater than the amount of plaintiff's claim defendant became in effect a plaintiff, thus invoking the jurisdiction of the court on its behalf, and thereby waiving its right to be sued in Indiana, and not in Illinois.

3. The delay in furnishing detailed drawings or specifications of pipe was without injury to the plaintiff, and immaterial.

4. By its conduct defendant waived all right to damages for not furnishing the 15 and 20 inch pipe at the time stipulated in the contract.

5. Defendant waived its right to possible reimbursement for overcharges on pipe by reason of the facts found in paragraphs six and nine of the findings of facts.

6. At the time of beginning suit defendant was indebted to plaintiff for material delivered under the contract of August 13, 1902, in the sum of nine thousand eighty-two dollars and twenty-one cents, and judgment therefor is hereby directed in favor of the plaintiff and against the defendant, with costs.

By the Court. ARTHUR L. SANBORN, Judge.

Dated August 31, 1905.

(Endorsed) Filed August 31, 1905.

MARSHALL E. SAMPSELL, Clerk."

ERRORS RELIED ON.

The assignment of errors is on page 30 of the printed transcript, and is in three specifications, as follows:

"The defendant in this action, in connection with its petition for writ of error, makes the following assignment of errors which it avers occurred upon the trial of the cause, to wit:

1. The court erred in taking jurisdiction in said cause.

2. The court erred in holding that William H. Schott occupied such relations to the defendant that he could subject it to this court's jurisdiction, when engaged in the prosecution of his own business in his own office in Chicago.

3. The court erred in holding that by claiming in a bill of particulars a sum greater than the amount of plaintiff's claim, the defendant became in fact a plaintiff, and thus invoked the jurisdiction of the court on its behalf, and thereby waived its right to be sued in Indiana, and not in Illinois.

For which manifest errors the plaintiff in error and de-

fendant prays that the judgment be reversed, and said cause be dismissed.

CHARLES H. ALDRICH,
ALDRICH & MCCAULEY,
Attorneys for Defendant and Plaintiff in Error.

(Endorsed) Filed September 18, 1905.
MARSHALL E. SAMPSELL, Clerk."

Perhaps the entire error is covered by the first specification, viz.:

"The court erred in taking jurisdiction in said cause."

The sole question for consideration is: Was Schott the agent for the defendant and doing business for defendant in Chicago in such a sense as that service of process on him was service on the company defendant?

With reference to this question our contentions are two-fold:

First. While Schott was buying material to be used in the construction of defendants' plant, which was purely local, at Indianapolis, and while he was using the credit of the company in making such purchases, yet he was, in fact, an independent contractor, and as between him and the plaintiff, the latter was his surety only. (Transcript, p. 24.)

It there appears that he, Schott, agreed for a stipulated sum, $275,079.38, to construct and set in operation the entire plant at Indianapolis, he furnishing all materials. He was therefore buying these materials for himself. He was doing business in making the purchases directly for himself—and only remotely, if at all, for the defendant, which in fact was doing no business in Chicago, but at most was allowing the use of its name to its contractor by way of surety, or to give him credit.

Second. The mere purchasing of materials or other

work he is found to have been doing in this matter in Chicago was not "doing business" for defendant in Illinois in the sense of the statute and decisions necessary to give jurisdiction.

What is meant by that statute is, it is submitted, that the foreign corporation is doing some part of the business it was organized to carry on, some part of the business which it has no right to do in a foreign state except by the procuring a license so to do.

ARGUMENT.

We address ourselves to the second question first. Indeed, the two are so closely intertwined that they may be discussed together. The Illinois Practice Act (Rev. St. 1897, p. 109, section 5) provides that process against a corporation shall be served upon the president, or, if he does not reside in the county, or is absent therefrom, then by leaving a copy thereof with any clerk, cashier, secretary, engineer, conductor or agent of the company found in the county.

This has been held to apply to foreign corporations.

It has been held, however, by this court, that in order to authorize such service on an "agent" of a foreign corporation found within the state such agent must be there doing business for his corporation; and that such service, even upon the president of the foreign corporation, who is in the state in which the suit is brought, but not there prosecuting the business of the corporation, is not good service.

Goldey v. *Morning News*, 156 U. S. 518.

A case still more directly in point is *Conley* v. *Matheson Alkali Works*, 190 U. S. 406.

In that case the plaintiff, a citizen of New York, was suing, in a state court of New York, the defendant, a cor-

poration of Virginia. The defendant had designated no agent upon whom service could be made in New York. Two of its directors, however, were residents of New York, and service was made on one of them April 18, 1901, as the New York statute provided might be done. The case was removed to the U. S. Circuit Court.

The defendant, in December, 1900, sold the plant and property to another Virginia corporation, but it appeared from the evidence, and was found by the master, that the by-laws of the defendant provided for the holding of the meetings of the board of directors in the city of New York; and that at least two or three such meetings were held in the city of New York in 1901.

Upon this state of facts (in addition to the fact that defendant held the entire capital stock of the Virginia corporation to which it had sold out) it was held that defendant was not doing business in New York so as to justify service on one of its directors.

Another case holding that in addition to being the agent, that agent must be engaged about the business of his company in order to authorize service upon him, is

Lumberman Ins. Co. v. *Myer*, 197 U. S. 407.

This, then, may be regarded as settled. It is not enough that one be an officer of the company or an agent; but he must be an officer or agent engaged in the business of the company in the state where the service is sought to be made effective.

The question then arises in what *kind* of business of the company he must be engaged.

It is evident from the cases already cited that not every transaction in the state in the way of business will authorize service.

Thus an Indiana corporation, engaged in the dry goods business in that state, which, by an agent, should buy a

bolt of calico in New York or Chicago, would not be held to be engaged in business in either of the latter states in such a sense as to justify service.

So it is submitted that the defendant, by buying through an agent in New York a pump from H. R. Worthington, or in Pittsburg an engine from Westinghouse, would not be doing business to warrant such service, especially if, as in the case at bar, the only purchases were for the purpose of launching or equipping the corporation, nor is it believed that a dozen such purchases for a like purpose would have such an effect.

On the contrary, it is believed that the solution of the question does not depend on the number of purchases, but on the kind of business done. And it is submitted that the business done must be something in the line of that for which the corporation was organized. That is, for instance, if the corporation is a bank to be operated solely in Indianapolis, it is not believed that the buying of a safe or other office furniture in New York would be doing business within the meaning of the law; or, if it is a local corporation for the manufacturing of furniture, that the purchase of the necessary planers, saws and other equipment for the plant would subject it to service in a foreign state; or, if it is an insurance company, that the buying of books, office desks, etc., would bring it within the law; or, if it is a purely local street railroad to be operated only in Indianapolis, that the sending of an agent to Dayton or St. Louis to buy cars, or to Pittsburg to buy motors would constitute doing business in either of those states within the meaning of the law.

If, however, the bank should in the foreign state establish an office for the doing of any part of its banking business; if the furniture company should in the foreign state have agencies for the transaction of any part of its business, as for the sale of its furniture, for instance; or

the street railroad company should establish in New York a fiscal agency, then a very different proposition would be presented.

If a test of this kind is made, dependent on the *kind* of business done, then a rule or principle is established which can be readily applied by all courts, and decisions will be harmonious.

All states, including Illinois, have statutes requiring foreign corporations to take out licenses and designate an agent on whom service may be made before they can be permitted to do business in the state.

(Laws of Illinois 1899, p. 118.)

Section two of this act reads as follows:

Section 2. Every corporation for pecuniary profit formed in any other state, territory or country, before it shall be authorized or permitted to transact business therein, if already established, shall designate some person as its agent or representative in this state on whom service of legal process may be had if desired; shall have and maintain a public office or place in this state for the transaction of its business, and where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provisions governing such corporation; and such corporations shall be subjected to all liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers. And no foreign corporation established or maintained in any way for pecuniary profit of its stockholders or members shall engage in any business other than that expressly authorized in its charter, or the laws of this state under which it may come, nor shall it hold any real estate except such as may be necessary and proper for carrying on its legitimate business. And no corporation incorporated under the laws of any other state, territory or country, doing business in this state, shall be permitted to mortgage, pledge or otherwise

encumber its real or personal property situated in this state to the injury or exclusion of any citizen or corporation of this state who is a creditor of such foreign corporation. And no mortgage by a foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other state, shall take effect as against any citizen or corporation of this state until all its liabilities due to any person or corporation in this state at the time of recording such mortgage have been paid and extinguished.

The next section provides that the corporations shall file with the secretary of state a copy of its articles of incorporation, and a statement of the proportionate part of its capital used in its business in Illinois, and pay certain franchises, taxes, etc.

The fourth section imposes severe penalties for a failure to comply with this law.

It is submitted that the business necessary to authorize service of summons is the kind of business contemplated by this statute. It certainly does not wrong the state to hold that it has here defined the business which makes an agent liable to service. Will any one argue that the making of such purchases as were made, or the doing the things that were done, as shown in the special findings in this case, without a compliance with this statute, rendered appellant amenable to the penalties prescribed by section four of this act?

As has been already stated, if a test bottomed on the character of the business is applied, there will be some certainty and uniformity in the decisions. If, however, it is held that an agent is "engaged in the business" of his company because he is making miscellaneous purchases with a view to equipping his company to enter business, or having sporadic transactions in such state not a part of the business the company was created to do—and not contemplated by the law of such foreign state for licensing

such corporations—then there can be no certainty or uniformity of decision, but every judge will make a rule for himself.

Nor is it to be overlooked that it may well be held that a manufacturer or merchant who is selling its product or his merchandise in a foreign state stands upon a very different footing from another corporation which buys in a foreign state materials to be used, not in the common course of its business proper, but only for the purpose of furnishing and equipping its plant to enable it to enter upon and prosecute its business—business which it only has a right to prosecute in a foreign state after procuring a license therefor.

Beyond question, as heretofore suggested, the Merchants' Heat and Light Company had a right to go to Chicago and purchase supplies such as it did purchase there, without taking out any license under the statutes of Illinois. In so doing it was not "prosecuting its business" in Illinois within the meaning of the statute, and it seems to us, as already stated, that along this line a rule may be formulated based upon principle. Accordingly, upon this idea, although not distinctly announced in so many words, repeated decisions have been made denying the jurisdiction by the circuit courts of appeal and the circuit courts.

Thus in the case of *Central Grain, etc.*, v. *Board of Trade, etc.*, 125 Federal 463, on page 466, Judge Jenkins, speaking for the circuit court of appeals of the seventh circuit, says:

"There could be no presumption of its presence within the state of Illinois. There were but two conditions in which the court below could obtain jurisdiction over the corporation; the one by voluntary appearance—a condition which did not occur; the other, if the corporation prosecuted its business in the state of Illinois, by service of process upon some officer or agent in that state *ap-*

pointed to there transact and manage its business and representing the corporation in such state. Service upon an agent of a corporation is not service upon the corporation, unless it be engaged in business in the state where said agent is served and *he be appointed to act for it there.*" (The italics are ours.)

It seems to us that, if Judge Jenkins meant what he said and said what he meant, this is precisely that for which we are contending. In support of this decision he cites a number of cases.

In *N. K. Fairbanks & Co.* v. *Cincinnati, etc., Railway Co.*, 54 Federal 420, an attempt was made to bring into court a foreign railroad company in Chicago by service upon a person employed by the defendant at the time of the alleged service of the writs for the sole purpose of diverting freight and passengers destined south to such railroads leading out of Chicago as had running connection with the defendants' line at Cincinnati. It appeared that such person had no authority to sell tickets or to make contracts or rates for the transportation of freight and passengers; but the defendant, at its own expense, supplied him with office accommodations in Chicago, for the purpose of doing the work he was assigned to do. It was held by the circuit court of appeals that he was not an agent within the meaning of the law, and the service was set aside. This was a decision before Justice Harlan, Judge Gresham and Judge Woods, circuit judges, Judge Woods dissenting.

The same doctrine was declared by the same court in *Wall* v. *Chesapeake, etc., Railroad Co.*, 95 Federal 398.

The language of this court in the case of *Fitzgerald, etc.*, v. *Fitzgerald*, 137 U. S. 98, is in support of the same idea. It is there said: "Where a foreign corporation is not doing business in the state, and the president or any officer is not there transacting business for the cor-

poration and representing it in the state, it cannot be said that the corporation is within the state so that service can be made upon it." (*St. Clair* v. *Cox*, 106 U. S. 350; *New England Mutual Life Insurance Co.* v. *Woodworth*, 111 U. S. 138.)

In the case of *St. Clair* v. *Cox*, 106 U. S. 350, on page 355, Mr. Justice Field says, speaking of the fact that companies incorporated under the laws of one state carrying on a vast volume of business in other states, and of the old rule that a corporation could not migrate and the inconvenience resulting therefrom, says that the legislators of the states have interposed and provided for service of process on an officer or agent of a foreign corporation doing business therein:

"Whilst the theoretical and legal view, that the domicile of a corporation is only in the state where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other states and opened offices to carry on its business there, it was, in effect, as much represented by them there as in the state of its creation. As it was protected by the laws of those states, allowed to carry on its business within their borders and to sue in their courts, it seemed only right that it should be held responsible in its courts for obligations and liabilities there incurred."

Further along in the opinion Justice Field says: "A corporation of one state can not do business in another state without the latter's consent, expressed or implied, and that consent may be accompanied with such conditions as it may think proper to impose."

It is submitted that this language clearly implies that the business to which reference is had is such business, and such business only, as the state has seen fit in its sovereign capacity to inhibit, except after a license has been

procured. It certainly does not refer to casual transactions, such as a local corporation in one state sending agents into another state to buy material to be used in the prosecution of its business, although, of course, if such a corporation should establish an agency for such purpose, and make a regular business of such purchases, a very different proposition would be presented; a proposition like that involved in the fact of a manufacturing corporation having its *situs* in one state and its selling agency in another state.

In the *St. Louis Wire Mill Co.* v. *Consolidated Barbed Wire Co.*, 32 Federal 802, the defendant was a corporation of Kansas. Its chief place of business and office was at Lawrence, in that state. It had never had any business office in Missouri, nor maintained an agent in that state for the transaction of any business. It had made occasional purchases of plain wire in the city of St. Louis, either by correspondence or by sending an agent there for that purpose. In December, 1885, one Henley, who was served with process in the case, purchased of the plaintiff in the city of St. Louis five hundred tons of wire. Subsequently a controversy arose as to the terms of the purchase. That controversy remained open and unadjusted until October 6, 1886, at which time Henley and his wife came to St. Louis for the purpose of attending the fair. While there he was called upon at his hotel by the secretary of the plaintiff, with a view to an adjustment of the old account. Conversation was had on that subject, but the parties failing to agree, the secretary of the plaintiff and Henley went to the office of the Southern Wire Company to confer with other officers of the plaintiff corporation with respect to a settlement. Further conversation took place at the office of the Southern Wire Company, but it resulted in the parties failing to come to any understanding. While at the office of the Southern Wire Com-

pany Henley asked an officer of that company to give him a quotation on five hundred tons of plain wire, as if he desired to make such a purchase. No quotation was made him, however, and no purchase was made. After Henley left the office of the Southern Wire Company, and within a few hours, he was served with process, and it was held that he was not an agent for the Kansas company doing business in Missouri.

The same doctrine was laid down in *Good Hope Co.* v. *Railway Barbed Fencing Company*, 22 Federal 635.

In *United States* v. *Telephone Company*, 29 Federal 37-41, it was held by Judge Jackson that a corporation, in order to bring itself under liability to such service, must transact within the state some substantial part of its ordinary business through an agent appointed for that purpose.

Maxwell v. *Atchison, etc., Railroad Company*, 34 Federal 286, we have a decision by Judge (afterward Justice) Brown. That was a suit in Michigan against the Atchison Railroad, service being made upon one Gilman, who was the agent of that company in Detroit, and solicited persons intending to travel in Kansas to patronize the defendant road. That was the extent of his agency, except that he was also employed by the defendant to compromise plaintiff's claim, which was for expulsion from a train of defendant. This agent, Gilman, was represented upon the folders of the defendant as its "passenger agent." Judge Brown says:

"The general rule appears now to be well settled that a foreign corporation may be sued within any jurisdiction wherein it carries on an important part of its business. Where under the laws of the state it is required as a condition of doing business within the state that it shall appoint an officer or agent upon whom process may be served, such corporation is always treated as 'found' with-

in the state within the meaning of the judiciary act, and suits in the federal courts may be instituted by service upon him," (citing numerous cases).

"On the other hand, when an officer of a foreign corporation is temporarily visiting or traveling within the state, it is equally well settled that service of process against the corporation can not be made upon him, if the corporation is not actually doing business within the state." (*St. Clair* v. *Cox*, 106 U. S. 350; *Newell* v. *Railway Company*, 19 Mich. 336.) "What is the amount or character of business which a corporation must do to subject its agent to process within a foreign state, is left in some doubt by the authorities. If it have an office for the general transaction of its business, or selling of its goods if it be a manufacturing corporation, or the making of contracts and the receiving of freight and passengers if it be a railroad company, it would appear to be sufficient."

After further discussion Judge Brown refers to the decision of Judge Jackson in the telephone case heretofore referred to, holding that such business, in order to justify service, must be transacted or managed by some agent or officer appointed by and representing the corporation in such state. And further along he says that from the folders of this company defendant it appears that it has agents of like character in a dozen different states. If it could be sued in Michigan for a cause arising in Kansas, it is equally amenable to suit in any one of those states in which it may happen to have a passenger agent for soliciting business. "It would, in my opinion, be an unwarrantable extension of the law of constructive presence to hold a road liable to suit in all of these different states, as a corporation or inhabitant found therein. The same principle would make every manufacturing or trading corporation liable to suit in any state into which it sent a commercial agent, or drummer, to solicit patronage."

So the language of Judge Hallett, in *Weller* v. *The Pennsylvania Railroad Company*, 113 Federal 502, seems to be directly in point, although in that case the question was somewhat different, as it arose in a patent case under the United States statute with reference to service on the defendant company. After discussing that question, Judge Hallett says that if he is mistaken in the view already taken, the Fairbanks case, the Wall case, and the Maxwell case hereinbefore cited, are in point.

"In these cases and in all that I have examined, the question considered was as to the character of the agent and the scope of his authority. Under the act of congress, the question is whether the defendant has a regularly established place of business, without reference to the character of the agent who may be in charge."

So it seems to us the case of the *Mutual Life Insurance Company* v. *Spratley*, 172 U. S. 602, while it sustains the service in that case, supports our contention. In that case it is held as the reason why the service is supported that the insurance company, although it had withdrawn from the prosecution of further active business in the state, was nevertheless still engaged in the insurance business in the state in connection with its pre-existing policies. That is, it was prosecuting its regular business in the state.

In the *Louden Machinery Co.* v. *The American Malleable Iron Company*, 127 Fed. 1008, we have a decision of Judge McPherson, of Iowa, which seems to us to be directly in point. The facts in that case were that the plaintiff, an Iowa corporation, purchased certain iron of defendant, an Illinois corporation, to be delivered f. o. b. Chicago. A difference occurring between the parties was attempted to be settled by their attorneys, who resided in Chicago, and having failed, defendant's president, having

occasion to travel through Iowa, stopped at plaintiff's place of business in order to settle the claim; and an offer being made by plaintiff on his stating that it would be necessary to lay plaintiff's proposition before defendant's board of directors, notice of suit was served on him. It was held that the service on defendant's president, under such circumstances, was insufficient to confer jurisdiction on the Iowa courts. Judge McPherson says, with reference to this state of facts:

"But it is said that because defendant's president came to the state on a visit and stopped off a train to try to settle a business difference, he thereby subjected his company to the jurisdiction of the Iowa courts. Carrying on a business by a corporation in another state means something more than a single transaction, and certainly something more than the one transaction of an attempt to compromise a matter connected with a contract in the state where the foreign corporation resides and has its being," citing numerous cases. "As yet I can not believe that a foreign corporation having a difference with an Iowa citizen concerning a contract not made in this state, surrenders itself to the Iowa courts, because an agent, with or without authority, comes to this state seeking to adjust such difference. If such be the law, then compromises, which are so much favored by law, are largely at an end, as to foreign corporations. The only case called to my attention upholding plaintiff's contention is one decided on the circuit by Judge Grosscup, in the case of *Houston* v. *Filer, etc., Co.*, 85 Federal 757, and that case is not authoritative, and, standing alone as it does, I can not follow it."

The Houston case, *supra*, has been followed by Judge Amidon, *Brush Creek, etc., Co.* v. *Morgan, etc., Co.*, 136 Federal 505, and he goes to the full length of saying that if an officer of a corporation goes into another state to settle a claim, he thereby subjects his corporation to suit. It seems hardly necessary to comment on this decision.

The doctrine for which we contend is fully set forth and enforced in the case of *Frawley* v. *Pennsylvania Casualty Company*, 124 Federal 259, a decision by Judge Archibald. Also in the *Buffalo Glass Company* v. *Manufacturers' Glass Company*, 142 Federal 273. It is there shown by the authorities that occasional purchases by a foreign corporation within a state, no office being kept nor any part of its general business operations carried on there, does not justify service, and numerous other cases are cited showing, as is stated, that in order to justify such service the agency must be of a substantial character and the business a part of the regular business of the company.

On the other hand, attention will doubtless be called to the Houston case, *supra*, decided by Judge Grosscup, and the recent decision of Judge Platt in Connecticut, *New Haven, etc.*, v. *Downingtown, etc.*, 130 Fed. 605, neither of which, as it seems to us, will bear examination. Indeed, it seems to us that the key to Judge Platt's decision is found in the following quotation:

"The court did not invite the cause, but it is here, and unless an inexorable sanction exists, it is not inclined to force a domestic corporation to migrate to a foreign forum in search of justice. It would seem ungracious for the defendant to permit its agent to visit Connecticut concerning matters which touch one branch of a transaction, and to object to service upon such agent of a notice that the plaintiff seeks to recoup in one direction what he has lately lost in another."

In that case the president of the defendant corporation arrived in New Haven to attend the National Christian Endeavor Conference to be held at that place. He was not present in New Haven for any other purpose than that aforesaid. While in New Haven, however, he had some negotiations with reference to a settlement of the

claim against his company. Judge Platt holds, as we submit, directly at variance with the decisions of other circuit courts, the circuit court of appeals and this court, that doing business within a state does not mean a persistent and continuous condition of doing or offering to do business, usually leading to the appointment of an agent or the establishment of an office within the state. The fact that Judge Platt refuses to recognize the distinction between the corporation and the partnership whose business it has purchased, seems to us to be very significant. What might have been the rights with reference to the partnership, is wholly immaterial. It was not the same entity as the corporation, and the attempt to confuse the two is misleading. *Pullman, etc.*, v. *Missouri, etc., R. R.*, 115 U. S. 587. Judge Platt contends that because the corporation had made five sales in the state of Connecticut, amounting in the aggregate to less than $100, it was doing business in the state; although it does not appear that even these goods were sold through an agent in Connecticut. Nor is his reference to the California case, *Dow* v. *Springfield*, 104 Federal 684, more persuasive. It is not seen how the fact that the latter was an admiralty case is material. The question is simply: "Was the agent doing business in the state in such a way as to bring the corporation into the state subject to service?"

There is this, however, to be said in reference to Judge Platt's decision, that the transactions there were sales in the regular course of business of the corporation, not purchases with a view of launching a corporation.

As against this decision by Judge Platt and that of Judge Grosscup in the Houston case, attention is called to the decision of Judge Wallace in *Good Hope* v. *Railway Barbed Fencing Company*, 22 Federal 635, where it is held that the fact that the president of a corporation is

in a state for the purpose of adjusting a controversy growing out of a purchase, does not subject him to service of summons so as to give jurisdiction. It is evident that this decision of Judge Wallace is directly contradictory to that of Judge Amidon and the others along that line.

So in *Cleaves* v. *Woodstock Iron Company*, 44 Federal 31, a decision by Judge Lacombe held, following the Good Hope case, that the fact that a corporation which has done no business in New York beyond negotiating a mortgage on its property and having the bonds secured thereby put on the list of the New York Exchange, is not engaged in business in the state, and no jurisdiction over it is acquired by a service of summons on its president while temporarily in the state for this purpose.

In *Gilchrist* v. *Helena, etc., Railroad Company*, 47 Federal 593, it is held by Judge Knowles that a statute requiring a corporation to take out a license before doing business in the state is not violated by a foreign trust company which takes a mortgage in the state upon the railroad company's property to secure bonds, because "such isolated act is not doing business in the state."

So in *Caesar et al.* v. *Capell et al.*, 83 Federal 403, it is held that where a foreign corporation which has not complied with the statutes of Tennessee by filing its charter, etc., through any agent whatever, makes a loan to a citizen of Tennessee which he contracts to repay at the domicile of the corporation, secured by a mortgage on land in the state of Tennessee, this does not constitute doing business in the state of Tennessee, within the prohibitory and penal provisions of the statute.

In like manner in *Eirich* v. *Donnelly Contracting Company*, 104 Federal, page 1, it is held that a corporation of New York, having its office in Buffalo, which does not

maintain and has never maintained any office or place of business in Ohio, is not found in that district within the meaning of the federal statutes so as to be subject to service, because one of its officers is temporarily in Ohio superintending work being done by the corporation in a harbor under a contract with the United States, and service of process upon such officer confers no jurisdiction on the courts of the state or district over the corporation.

Finally, upon this point, attention is called to the decision by this court in the case of *Cooper Manufacturing Company* v. *Ferguson*, 113 U. S. 727, where it is held that, while it is competent for a state by statute to prescribe the terms upon which a corporation shall be permitted to come into the state to do business, that is, to establish and maintain agencies in the state for the purpose of carrying on its ordinary business, it is not competent for it to forbid entirely, or to impose restrictions upon the manner in which outside corporations shall buy and sell within the state, since that would be an interference with the interstate commerce law. It seems to us, without further argument, that what was done in the cases at bar was in the way of transactions of the latter character, and not the former, and that therefore the Merchants' Heat and Light Company was never engaged in business in Chicago in such a sense as to subject it to the service of process.

II. Passing to the other question, it is found, as we have already shown, on page 24 of the transcript in the special finding of the judge, that the company defendant was to pay Schott for all materials, labor and everything in the entire plant, $275,079.38, including his compensation, which was to be 10 per cent. of all bills for construction. It thus appears that Schott had undertaken, on his own account, and for a fixed sum of money, to purchase all materials, perform all labor, and install this

plant and put it in operation. Thus it is perfectly clear that he was the principal, and the Merchants' Heat and Light Company was a mere surety in this transaction. If he made the purchases and failed to pay the bills, by their permitting him to use their credit they would become liable, immediately liable, to purchasers; but he was making the purchases for himself; he was not making them for the company; therefore it was he, that, in making these purchases and attempting to adjust any difference in Chicago, was doing whatever "business" was done, and not the corporation. If he failed to pay the bills and the company was compelled to pay them, they would have their right to action against him; but it is certainly clear that the one who guarantees the bills of another contracted in a foreign state, or lends its credit for such bills, does not thereby do business in that state, within the meaning of the statute under consideration. Whatever was the character of business being done, it was Schott's business, not the business of the Merchants' Heat and Light Company.

Moreover, the finding is that Schott was maintaining a business office in the Marquette Building, Chicago, that his name was on the door as engineer and contractor, and that he paid the rent. There is no finding that the company was doing business in said city, except as it finds that Schott was the general manager for said company, and the finding is that he made purchases of cables, engines, boilers, generators, pipe, fittings and other supplies in that city. And it is to be noted that every suggestion of business done by Schott, even as general manager, is business, not of the corporation, for which he was required to take out a license in Illinois, not business contemplated by the statute at all, but simply purchases such as might be made by any party preparing to install a plant in any center of trade. If, as the authorities above cited

seem to indicate, the business contemplated by the statute is such as it would be unlawful for the corporation to do in Illinois except under license, then it is perfectly clear that this service ought to have been quashed and the jurisdiction denied.

III. By the second conclusion of law, page 28, the judge declares that by reason of the fact that defendant pleaded a set-off in an amount greater than plaintiff's claim, it thereby waived all objections to jurisdiction. In other words, that because after making every possible objection and taking every possible exception to the right of the court to proceed at all, as it believed in violation of its rights, the court insisted in going on and adjudicating the case, then the defendant would insist upon having all its rights determined in the one litigation, it waived all question as to jurisdiction.

Suppose it had a genuine set-off for an amount greater than the amount claimed in the complaint, was it bound, in order to maintain its rights and not be sued in Illinois, to divide that set-off into parts and have two or three litigations instead of one? If any authorities have been cited for the support of this proposition, they have never been seen by the writer of this brief, and it is not believed that the proposition contained in this second conclusion of law is correct.

It has been repeatedly held that where a party once makes objection to the jurisdiction and reserves a right thereunder, he does not waive an illegality in the service, if, after said motion is denied he answers to the merits. Set-off is certainly part of the answer to the merits, and, it seems to us, is no waiver.

Central Grain, etc., v. *Board of Trade, etc.*, 125 Federal 463, Circuit Court of Appeals, Seventh Circuit. *Lowden, etc.*, v. *American, etc.*, 127 Federal 1008. Is it to be held that a party could divide up a claim and litigate

it in two parts? and if not, then to hold this conclusion of the judge to be right is to deny to a party all of his claim over and above that of the plaintiff.

We ask that the judgment of the Circuit Court be reversed.

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